

1 BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION

2 STATE OF MONTANA

3 * * * * *

4 JENNIE EKWORTZEL,

5 Appellant,

6 vs.

7 STILLWATER COUNTY (MONTANA)
8 SCHOOL DISTRICT NO. 31, by and
through its Board of Trustees,

9 Respondent.

OSPI 201-92

DECISION AND ORDER

10 * * * * *

11 **PROCEDURAL HISTORY OF THIS APPEAL**

12 Jennie Ekwortzel is appealing the December 20, 1991,
13 decision of acting Hill County Superintendent of Schools, Shirley
14 Isbell, affirming a decision of the Stillwater County School
15 District No. 31 Trustees [hereinafter "the Trustees"]. The
16 Trustees did not renew Ms. Ekwortzel's contract for the 1991-1992
17 school year.

18 Ms. Ekwortzel was one of two tenured teachers at Nye
19 Elementary School. Declining enrollment from seventeen ANB in
20 1990-91, to nine in 1991-92, resulted in less state money to
21 District No. 31 for the 1991-92 school year. Without a voted
22 levy the general fund budget limit in 1991-92 was approximately
23 \$32,000, compared to an approximately \$70,000 budget in 1990-91.

24 The Trustees determined these adverse economic conditions
25 required a reduction in force [hereinafter "RIF"] and began the

DECISION & ORDER P. 1

1 process of deciding which teacher's contract would not be
2 renewed. On March 23, 1991, they sent Ms. Ekwortzel a notice of
3 recommendation of termination of employment. [Hereinafter "the
4 March 23 Notice"]. The reason stated was:

5 (T)he declining enrollment in the Nye School and
6 financial difficulties and problems which result in the
7 need to eliminate one of the two teaching positions.
8 In addition, Teresa Miller, Stillwater County
9 Superintendent of Schools advised the Board by letter
10 dated March 1, 1991, that current enrollment does not
11 provide enough revenue to support the current staff
12 load.

13 On April 10, 1991, the Trustees held a hearing on the
14 recommendation [hereinafter "the April 10 hearing"] and, at the
15 end of the hearing, voted to terminate. There is not a verbatim
16 transcript of this hearing in the record. It is summarized in
17 the minutes of the April 10, 1991 meeting [Exhibit I]. On May 5,
18 1991, Ms. Ekwortzel appealed to the County Superintendent under
19 § 20-4-204(5), MCA.

20 The County Superintendent's hearing was held over four days
21 in July, August and September of 1991. Testimony was heard,
22 exhibits were admitted and a record was made. The County
23 Superintendent affirmed the decision of the Trustees.

24 On January 16, 1992, Ms. Ekwortzel appealed to this
25 Superintendent. Under § 10.6.121, ARM, the parties had the
opportunity to brief and argue the issues. This Superintendent
received briefs from both parties. They chose to forego oral
argument.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
16
19
20
21
22
23
24
25

The State Superintendent may not substitute her judgment for that of a County Superintendent as to the weight of the evidence on questions of a fact. Findings are upheld if supported by substantial, credible evidence in the record. A finding is clearly erroneous only if a "review of the record leaves the Court with the definite and firm conviction that a mistake has been committed," Wage Appeal v. Board of Personnel Appeals, 208 Mont. 33, at 40, 676 P.2d 194, at 198 (1984).

DECISION & ORDER P. 3

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

cause." Massev v. Trustees, Custer County and Ed Argenbright,
211 Mont. 331, 683 P.2d 1332, at 1334, 41 St. Rep. 1393, at 1396
(1984).

A tenured teacher cannot be deprived of this property right
without due process of law. Board of Reagents v. Roth, 408 U.S.
564, 92 S.Ct. 2701 (1972). "The due process clause of both the
Federal and Montana Constitutions protects a tenured teacher's
interest in continued **employment**." Holmes v. Board of Trustees,
243 Mont. 263, 792 P.2d 10, 47 St. Rep. 914, at 918 (1990).
Procedural rights are also provided by statute (§ 20-4-204, MCA).

B. Termination of tenure,

3. Objective criteria fairly applied in a RIF. Trustees
must have good cause before they terminate tenured teachers
because of § 20-4-203, MCA, and must follow reasonable and fair
procedures when making termination decisions because of the Due
Process Clause and § 20-4-204, MCA.

Trustees faced with adverse economic conditions have good
cause to initiate a RIF. Sorlie v. Trustees, Yellowstone County
School District No. 2, 205 Mont. 22, 667 P.2d 400, 40 St. Rep.
1070 (1983). However, deciding that adverse economic conditions
justify a reduction in the number of teachers is only the first
step. A board of trustees must then use objective criteria that
are fairly applied to decide which teacher(s) will be retained
and which will be terminated. This is required to satisfy Due
Process. Texas Faculty Ass'n, v. University of Texas at Dallas,

1 446 F.2d 379, 70 Ed.Law Rep. 377 (5th Cir. 1991).

2 "[D]ue process is flexible and calls for such procedural
3 protections as the particular situation demands. " Matthews v
4 Weldridge, 424 U.S. 319, 96 S.Ct 893 (1976). In Texas Faculty
5 Ass'n. the issue was, given that Due Process is flexible, what
6 procedural rights do tenured faculty have when termination is the
7 result of program elimination? The Federal Court held:

8 A procedure ensuringg that (1) an instructor was not
9 terminated for constitutionally impermissible reasons,
10 (2) the administration's actions were taken in good
11 faith, and (3) objective criteria were employed and
12 fairly applied in determining whom from among the
13 faculty at larae to terminate is all that the
14 Fourteenth Amendment requires. (emphasis original)
15 946 F.2d at 387.

16 The concept that Trustees must apply fair, objective
17 criteria to decide which tenured teachers are affected by the RIF
18 is also hornbook law:

19 Even if the school board can establish the necessity
20 for a RIF decision, it is likely to be challenged in
21 the exercise of its discretion to determine the
22 position to be eliminated and the employees to be
23 affected. Courts have generally granted broad latitude
24 to school boards in the determination of those
25 positions which are expendable, but apply some
oversight to board decision on the selection of a
particular employee in order to insure compliance with
state statutory standards and bargaining agreements.

26 The broad discretion of boards to determine the
27 positions or employees subject to a RIF does not
28 diminish the need, in most instances, for the board to
29 articulate some reason for its decision. Consistent
30 with applicable state law, schools usually are required
31 to have reason necessitating a RIF and also to
32 establish the relationship to the teacher to be
33 affected. Rapp, James E., Education Lay, 6.08[2][c],
34 p. 6-160.2.

1 2. Notice and hearing. Trustees first decide good cause --
2 adverse economic conditions -- exists to terminate tenured
3 teachers, then use fairly applied, objective criteria to
4 recommend which teachers will lose their jobs. Trustees must
5 then give tenured teachers notice of the reasons for their
6 recommendation and an opportunity for a meaningful pre-
7 termination hearing. Both the Fourteenth Amendment and Montana
8 statute require this.

9 The U.S. Supreme Court has held that a meaningful pre-
10 termination hearing for tenured employees is a Due Process right.
11 The pre-termination hearing does not have to provide elaborate
12 procedural safeguards but, before termination, tenured employees
13 are entitled to oral or written notice of the employer's
14 reasoning, an explanation of the employer's evidence, and an
15 opportunity to present their side of the story. Cleveland Bd. of
16 Educ. v. Loudermill, 105 S.Ct. 1487, 23 Ed.Law Rep. 473 (1985).

17 To have a meaningful hearing, the tenured teacher has to
18 receive pre-hearing notice of the criteria the Trustees used to
19 make their decision. The purpose of a meaningful hearing is to
20 give the teacher the opportunity to refute the Trustees' appli-
21 cation of the criteria to him or her.

22 Hearing and notice are also statutory rights in Montana.
23 Section 20-4-204, MCA, requires a pre-termination hearing and
24 states that tenured teachers must receive a "statement of the
25 reason or reasons that led to the recommendation for

1 termination^H. § 20-4-204(2), MCA. There is no RIF exception.

2 While Montana law applicable to non-tenured teachers
3 specifically excepts RIFs from procedural protections (§ 20-4-
4 206(6), MCA), there is no exception to the requirements of § 20-
5 4-204(2), MCA, for terminating the employment rights of a tenured
6 teacher when such termination is required by declining enrollment
7 or financial condition of the district.

8 II. The law applied to this case.

9 There are two errors of law in this case. The Trustees
10 maintained that in a RIF they did not have to use fairly applied,
11 objective criteria to decide which of their teachers were
12 terminated. The second error follows from that erroneous
13 assumption; the March 23 Notice [Exhibit G] did not give Ms.
14 Ekwortzel written notice of why the Board determined she was
15 terminated and the April 10th hearing was not a meaningful pre-
16 termination hearing.

17 A. Objective criteria fairly applied.

18 Throughout these proceedings the parties disagree about what
19 criteria, if any, the Trustees were required by law to use and
20 what criteria they actually used. The Trustees argued that,
21 because of the RIF, to justify their decision to terminate Ms.
22 Ekwortzel all they had to show was evidence of adverse economic
23 conditions; they also maintained that was the only criterion they
24 did use. Ms. Ekwortzel maintained that the Trustees had, in
25 fact, used criteria other than adverse economic conditions to

1 decide she would be terminated.

2 The County Superintendent consistently ruled, ~~as~~ a matter of
3 law, that economic evidence of a need to RIF was relevant and
4 other evidence was irrelevant. (See, for example, the July 8,
5 1991, order denying motion to dismiss and motion for summary
6 judgement, Tr. p. 196, and conclusions of law 4 and 5 of the
7 December 20, 1991, order on appeal). This was an error of law.

8 As discussed above, during a RIF Trustees must apply
9 objective, fair criteria to decide which teachers are terminated.
10 Texas Faculty Ass'n., supra. Evidence of adverse economic
11 conditions is relevant but evidence of the criteria used to
12 decide who is terminated is also relevant.

13 Deciding who to renew and who to terminate in a RIF is not
14 a determination that a tenured teacher is not competent or that
15 the teachers rehired are "better" teachers. The Nye Trustees
16 were correct that they did not have to offer such evidence in
17 order to terminate Ms. Ekwortzel. But they did have to show that
18 their decision was based on objective criteria, fairly applied.

19 The Trustees' legal error that they did not have to
20 articulate any reason for choosing Ms. Ekwortzel for termination
21 carried through to the County Superintendent's hearing and
22 tainted that hearing. Although the Trustees testified about
23 problems with Ms. Ekwortzel, their fundamental position was she
24 was terminated solely because of the RIF. Their failure to give
25 notice that they used any criteria for selecting her for

1 termination resulted in a denial of Due Process. Ms. Ekwortzel
2 has never had the opportunity to refute the Trustees' decision,
3 if she could, because the Trustees never acknowledged the
4 criteria for their decision.

5 It should be clearly understood that this Superintendent is
6 not mandating what objective, fairly applied criteria Trustees
7 must use during a RIF. Under Montana's Constitution, neither a
8 County Superintendent nor this Superintendent can mandate to a
9 local board what criteria must be used in this situation. "The
10 supervision and control of schools in each school district shall
11 be vested in a board of trustees to be elected as provided by
12 law." [Article X, Section 8]

13 The merits of the criteria used by the Trustees is not the
14 issue. The error in this case was their erroneous legal
15 conclusion, that because of the RIF they did not need to fairly
16 apply objective criteria to decide who to terminate.

17 The irony of the Trustees' legal position is that, as the
18 1,064 pages of transcript shows, they had criteria they applied
19 to decide to terminate Ms. Ekwortzel. That criteria should have
20 been stated in the March 23 Notice so that Ms. Ekwortzel had the
21 opportunity to argue whether it was objective and fairly applied
22 to her.

23 ~~2. Notice and a meaningful pre-termination hearing.~~

24 Neither the recommendation to the Trustees [Exhibit F, the
25 March 15, 1991 letter from David Miller] nor the March 23 Notice

1 stated what criteria the Trustees used to decide that Ms.
2 Ekwortzel would be the teacher terminated. The only reason
3 clearly stated was economic conditions, which as discussed above
4 is the reason for the RIF but not for the choice to terminate Ms.
5 Ekwortzel.

6 Without notice, her April 10th pre-termination hearing could
7 not be meaningful. The Trustees never cured the notice problem.
8 They never acknowledged that they had to use fairly applied,
9 objective criteria to select a tenured teacher **for** termination
10 during a RIF. The County Superintendent's hearing reflects the
11 **same** problem.

12 Besides a legal error, the Trustees' argument that their
13 Decision to terminate Ms. Ekwortzel was based solely on adverse
14 economic conditions is a non sequitur. Evidence of adverse
15 economic conditions establishes there is a rational basis for a
16 RIF; it does not explain how the decisions on who to keep or who
17 to let go are made. It is as logically inconsistent to say that
18 Ms. Ekwortzel was terminated because of adverse economic
19 conditions as it would be to say Ms. Stensaas, the other teacher,
20 **was** rehired because of adverse economic conditions.

21 The error in this case is not what criteria the Trustees
22 used, it is their failure to acknowledge that they used criteria
23 and their failure to notify Ms. Ekwortzel in writing before the
24 pre-termination hearing, what the criteria were.

25 III. Have substantial rights of the Appellant been

1 prejudiced?

2 Under the standards of Sirrer v. Trustees, Wheatland County
3 and Nancy Keenan, 241 Mont. 262, 786 P.2d 1161 (1990), and Harris
4 v. Trustees, Cascade County and Nancy Keenan, 241 Mont. 272, 731
5 P.2d 1318 (1990), both involving RIFs and procedural errors in
6 pre-termination hearing, "unless substantial rights of the
7 appellant have been prejudiced," the termination will be upheld.
8 This Superintendent concludes that the procedural protections Ms.
9 Ekwortzel did not receive were "substantial rights," and she was
10 prejudiced by their denial.

11 The Trustees failed to acknowledge they had to use fairly
12 applied, objective criteria and failed to give Ms. Ekwortzel
13 written notice of the criteria. This deprived her of procedural
14 rights guaranteed by the Fourteenth Amendment. She could not
15 meaningfully prepare a challenge to their decision. She could
16 not even rationally make the initial decision of whether to
17 challenge or accept the decision.

18 The procedural rights Ms. Ekwortzel did not receive are
19 guaranteed by the Fourteenth Amendment, as well as § 20-4-204,
20 MCA. A teacher in a two room school in Nye, Montana has the same
21 due process rights as a university professor in Dallas, Texas,
22 Texas Faculty Ass'n, supra, or a security guard in Cleveland,
23 Ohio. Cleveland Bd. of Educ., supra.

24 The issue of inadequate notice must be raised at the initial
25 proceeding. There is not a verbatim transcript of the April 10th

1 hearing. Ms. Ekwortzel raises the issue of notice through her
2 challenge of adequate written notice. (See "Petitioner's
3 response to Respondent's request for Identification of
4 Petitioner's Contentions," June 14, 1991, Document M-7).

5 IV. Proceedings on remand.

6 Because of the prejudicial procedural errors, this case is
7 remanded to the Stillwater County School District No. 31 Trustees
8 for a new hearing following proper notice. To avoid unnecessary
9 repetition of meaningless testimony on irrelevant issues, this
10 Superintendent will address a major substantive issue raised on
11 appeal.

12 Factual contentions about the Trustees, meeting in 1990
13 during which the other teacher was offered tenure are irrelevant
14 to this case. In 1991, when Ms. Ekwortzel was recommended for
15 termination, both teachers had been offered and had accepted a
16 contract for a "fourth consecutive year of employment by a
17 district in a position requiring teacher certification," and each
18 was **"considered** to be reelected from year to year thereafter as
19 a tenure teacher at the same salary and in the same or a
20 comparable position of employment as that provided by the last
21 executed contract with the teacher. . .". Section **20-4-203, MCA.**

22 Montana law provides only two alternatives **in** regard to
23 tenure for teachers: 1) nontenured (the teacher has not been
24 offered and has not accepted a fourth consecutive year of
25 employment by a district in a position requiring teacher

certification); or 2) tenured in accordance with § 20-4-203(1).

A district board of trustees lacks the authority to create a third category of tenure -- "conditional tenure,"

Teacher tenure is statutory. It is conferred by the legislature in accordance with the requirements of § 20-4-203, MCA. Both teachers had tenure in 1991. This is not a question of fact. Nothing Ms. Ekwortzel introduced about the April 1, 1990 Trustees' meeting is relevant.

Ms. Ekwortzel also has no contractual basis for claiming she could not be terminated. Both parties agree that there was no seniority clause in the teacher's contract. Ms. Ekwortzel did not have a factual basis for arguing she had a contractual right to be the teacher rehired. Her claims of detrimental reliance or promissory estoppel have no merit.

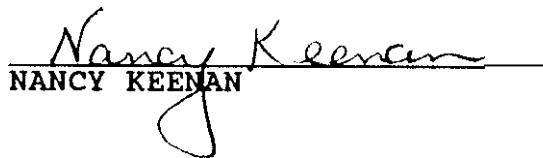
Detrimental reliance is one element of promissory estoppel. Estoppel is an affirmative defense that should be pled and proved by the party asserting it. It requires proof of a clear and unambiguous promise, reliance, reasonableness and foreseeability of the reliance, and injury. Keil v. Glacier Park, Inc., 188 Mont. 455, 614 P.2d 502 (1980).

There is no clear and unambiguous promise to Appellant in this case. The statement or "promise," if said, was not said to Ms. Ekwortzel and was legally unenforceable under § 20-4-203, MCA. Ms. Ekwortzel may have foregone other opportunities in 1990-91 because of her erroneous assumption a promise was made

1 out that was not the only reason she remained at Nye in 1990-91.
2 she was offered, accepted and paid for the performance of a
3 contract as a tenured teacher for the 1990-1991.

4 Ms. Ekwortzel also raised equitable estoppel and alleged
5 someone acting on behalf of the Trustees deliberately erased a
6 portion of the tape recording of the April 1, 1990, meeting and
7 replaced it with an altered version. The remedy for Trustee
8 misconduct, if it occurred, is not within the jurisdiction of the
9 County Superintendent or this Superintendent. The objective of
10 equitable estoppel "is to prevent a party from taking an
11 unconscionable advantage of his own wrong while asserting his
12 Strict legal right." In the Matter of Shaw, 189 Mont. 310, 615
13 P.2d 910 (1980). It does not apply to this case.

14 DATED this 5 day of May, 1993.

15
16 
17 NANCY KEENAN
18
19
20
21
22
23
24
25

CERTIFICATE OF SERVICE


THIS IS TO CERTIFY that on this 5th day of May, 1993, a true and exact copy of the foregoing Decision and Order was mailed, postage prepaid, to the following:

Donna K. Davis
MATOVICH, ADDY & KELLER
225 Petroleum Building
2812 First Avenue North
Billings, MT 59101

Laurence R. Martin
FELT, MARTIN, FRAZIER & LOVAS
450 Hart-Albin Building
208 North 28th Street
Billings, MT 59101

Shirley Isbell
Hill Co. Supt.
315 Fourth St.
Havre, MT 59501

Blair Jones
Stillwater County Attorney
P.O. BOX 179
Columbus, MT 59019



Scott Campbell
Paralegal Assistant
Office of Public Instruction